APPENDIX C

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GOVERNMENTAL ORGANIZATION
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December 19, 2005

Mr. Will Kempton, Director
California Department of Transportation
1120 N Street
Sacramento, CA 95814

Dear Will:

Thank you for meeting with us regarding the Shingle Springs Rancheria Interchange Project. Please express our appreciation to District 3 Director Jody Jones, Assistant Deputy for Legislative Affairs Janet Dawson, and Chief Legal Counsel Bruce Behrens for their participation in the meeting as well.

Thank you for confirming that Lakes Entertainment is funding the legal defense of the Shingle Springs Interchange Project in court. As mentioned yesterday, we believe that this arrangement represents a conflict of interest that jeopardizes Caltrans' ability to make impartial decisions in this matter. Privately funded attorneys seeking the financial betterment of an out-of-state gambling firm have no incentive to put the interests of California residents above those of their financiers. While we understand that it is not out of the ordinary for developers' attorneys to represent Caltrans in court where state and private transportation interests overlap, recent court decisions against this project demonstrate that the state's interest are not, or at least should not be analogous to the interests of Lakes Entertainment.

While we raised some concerns regarding the on-site impacts of the casino itself, you correctly reminded us that Caltrans' only jurisdiction in this matter is in regard to

potential impacts on transportation facilities. That being the case, we encourage Caltrans to view the recent court rulings as a window of opportunity to execute a new environmental analysis on this project using the most updated air quality model and traffic counts. As a matter of good public policy, we see no reason why Caltrans would not insist on using the latest tools to assess the true impact that the interchange and resulting casino will have on regional traffic and air quality. By not insisting on an accurate assessment of the impacts, Caltrans is foregoing the opportunity to mitigate potential problems.

You explained that Caltrans used the most updated traffic and air quality information available during the Shingle Springs EIR process. Furthermore, you suggested that as a matter of equity, it would not be fair for Caltrans to compel the developer to endure a new environmental analysis using updated air quality and traffic count data.

Again, the courts have already cast doubt on the sufficiency of Caltrans' earlier environmental review with respect to air quality. It is our understanding that this casino project is the only project of its kind to require a CEQA analysis, as similar projects fall exclusively under the purview of the federal government and NEPA. In addition, the proposed interchange serves only to facilitate the flow of traffic into the casino parking lot. The casino is clearly a net traffic generator. Given these unique characteristics it is entirely prudent for Caltrans to insist on an accurate assessment of the impacts in order to develop proper mitigation measures. Suggesting that the creation of an updated EIR is somehow inequitable to Lakes Entertainment—an out-of-state gambling firm who stands make tens, if not hundreds of millions of dollars from this casino is not a compelling or even reasonable argument. True equity demands full mitigation of the real casino-imposed impacts on the community and motoring public.

While there was no indication that Caltrans is interested in pursuing this path, we were encouraged that Director Jones would not issue a Statement of Overriding Consideration on this project. We believe that a richer environmental analysis would demonstrate that the casino-imposed impacts on traffic and air quality are in fact not able to be mitigated.

In response to Mr. Behrens suggestion that the Federal Highway Administration could sue Caltrans under Title VI, we would like to provide you with a legal analysis to the contrary. While reasonable people can disagree on the application of law, we hope it helps to inform Caltrans' position in this matter.

Finally, in the event the Department finds it necessary to seek legislation to mitigate the effects of *County of El Dorado v. Department of Transportation, et al.* we offer our services to help find a statewide resolution of the impacts that will allow for the continued construction of transportation projects while protecting the interests of our constituents and others who would benefit from a more complete environmental analysis of major projects in their jurisdictions.

Again, thank you for taking the time to hear our concerns.

Sincerely,

DAVE COX
Senator, First District

TIM LESLIE
Assemblyman, Fourth District

DC/TL: ma

Enclosure

Cc: Richard Costigan, Office of the Governor
Ed Knapp, Deputy El Dorado County Counsel

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MEMORANDUM

TO: MVB

FROM: DMS

DATE: December 19, 2005

RE: Environmental Justice Requirements
Our File No. 2030-010

QUESTION PRESENTED

Will the Shingle Springs Rancheria have a colorable claim under Title VI of the Civil Rights Act of 1964 if Caltrans refuses to move forward with the Shingle Springs Interchange ("Interchange")?

SHORT ANSWER

The Shingle Springs Rancheria will not have a colorable environmental justice claim under Section 601 of Title VI unless it can demonstrate that Caltrans' decision not to move forward with the Interchange was motivated by discrimination. Alternatively, to successfully defend a lawsuit under Section 602 of Title VI, Caltrans would only need to prove that its decision is related to a legitimate state interest.

DISCUSSION

Environmental Justice is not an issue in the present situation. Under federal regulations, both the state and metropolitan transportation planning processes must comply with Title VI of the Civil Rights Act of 1964. (23 C.F.R. § 450.220,subd. (a)(2); 23 C.F.R. § 450.316, subd. (b)(2).) Compliance with Title VI in the planning process is achieved during the planning certification reviews conducted for Transportation Management Areas ("TMA's"), and through the statewide planning funding rendered at approval of the State Transportation Improvement Program ("STIP").

Title VI provides two vehicles under which minorities may seek remedy for discrimination in federally funded programs and activities: Section 601 and Section 602. Section 601 of Title VI, Pub. L. No. 100-259, 102 Stat. 28 (1988), provides:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

(42 U.S.C. § 2000d.) The potential scope of Section 601 is broad: even if an allegedly discriminatory program is not specifically designated for federal funding, the clause "program or activity" embraces all activities of a state or local agency that receive federal monies (e.g., Caltrans, SACOG). However, in *Guardians Association v. Civil Service Commission* (1983) 463 U.S. 582 ("*Guardians Association*", the Supreme Court limited the scope of Section 601, holding that it only prohibits *intentional* discrimination, not actions that have a disparate impact upon ethnic minorities. (See *id.* at p. 610-11.)

In *Guardians Association*, the Supreme Court also held that Title VI delegates to federal agencies the authority to promulgate regulations incorporating a disparate impact standard under Section 602. (*Guardians Association, supra*, 463 U.S. 582, p. 584; see also *Alexander v. Choate* (1985) 469 U.S. 287, 293.) Thus, Section 602 provides a second vehicle for environmental justice advocates challenging state permitting decisions. (42 U.S.C. § 2000d-1.) Section 602 of Title VI provides in relevant part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract . . . is authorized and directed to effectuate the provisions of section 2000d [Section 601] of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken . . . . Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record . . . of a failure to comply with such requirement . . . .

(42 U.S.C. § 2000d-1.) Thus, Section 602 mandates agencies that distribute federal funds, such as FHWA, to promulgate regulations that implement Section 601, and requires agencies to create a framework for processing complaints of racial discrimination.

Several agencies have followed this mandate and adopted disparate impact regulations. For example, EPA's implementing regulations, adopted in 1973 and

amended to their current form in 1984, proscribe recipients of EPA funds from using "criteria or methods of administering its program which have the *effect* of subjecting individuals to discrimination because of their race, color, national origin, or sex . . . ." (38 FR 17,969 (1973);. 46 FR 2306 (1981); 40 C.F.R. § 7.35(b) (1984).) The language of the regulation contemplates a purely *discriminatory effect* standard. (*Guardians Association, supra,* 463 U.S. 582, 618 (1983) (Marshall, J.) (recipients may not use "'criteria or methods of administration which have the effect of subjecting individuals to discrimination.'" (quoting 45 C.F.R. § 80.3(b)(2) (1964).)

Thus, assuming the procedural hurdle created in *Alexander v. Sandoval* does not apply, a plaintiff challenging a decision under Section 602 is relieved of the burden of proving intent to discriminate; a showing of discriminatory effect or disparate impact on the basis of race suffices. However, the Supreme Court, in its landmark decision *Alexander v. Sandoval,* held that no implied private right of action exists to enforce disparate-impact regulations promulgated under Section 602 of Title VI. (*Alexander v. Sandoval* (2001) 532 U.S. 275, 293.)

More relevant, the U.S. Department of Transportation has promulgated regulations under Title VI prohibiting actions with a disparate impact upon minorities. Code of Federal Regulations, title 49, section 21.5, subdivision (b)(2) provides:

> A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program . . . may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin . . ..

In accordance with *Guardians Association, a* plaintiff alleging a violation of the Department of Transportation regulations must make a *prima facie* showing that the alleged conduct has a disparate impact. Once such a showing has been made, the burden shifts to the defendant to demonstrate the existence of "a substantial legitimate justification" for the allegedly discriminatory practice. (*Georgia State Conference of Branches of NAACP v. Georgia* (11th Cir. 1985) 775 F.2d 1403, 1417.) If the defendant sustains this burden, the plaintiff may still prove his case by demonstrating that other less discriminatory means would serve the same objective. (*Id.*; *Larry P. v. Riles* (9th Cir. 1984) 793 F.2d 969, 982.)

Thus, in an environmental justice suit by the Shingle Springs Rancheria, Caltrans would have the burden of showing that its decision not to move forward with the Interchange serves a legitimate state interest. This burden favors agency discretion, and is most comparable to the rational basis test. (*Elston v. Talladega County Bd. of Educ.* (11th Cir. 1993) 997 F.2d 1394, 1407 n.14; *Georgia State Conference of Branches of NAACP v. Georgia,* (11th Cir. 1985) 775 F.2d 1403, 1417; *Larry P. v. Riles* (9th Cir. 1984) 793 F.2d 969, 982 nn. 9 & 10.) Further, in this situation, it does not